

EXECUTIVE OFFICE OF THE PRESIDENT

BUREAU OF THE BUDGET

WASHINGTON, D.C. 20503

December 3, 1964

Mr. Abraham L. Kaminstein
Register of Copyrights
Library of Congress
Washington, D. C. 20540

Dear Mr. Kaminstein:

This is in response to your letter to Mr. Myer Feldman requesting the views of the executive branch with respect to copyright in Government publications. Mr. Feldman asked the Bureau of the Budget to look into the matter with the purpose of reconciling agency views as might appear indicated.

With the cooperation of your office, we prepared and circulated for agency comment a discussion paper which summarized the Government copyright problem and pointed up policy issues for review. The comments received indicated in general that agency practices were reasonably uniform with respect to what constitutes a Government publication on which United States copyright is prohibited by statute. However, a few agencies, because of the needs of particular programs, were not following a common understanding of the definition of a Government publication. We have taken these requirements into consideration and have identified particular circumstances which justify exceptions to the general prohibition against United States copyright in Government publications. We believe this paper explains the various interests which must be considered with respect to these significant policy questions. We are sending copies of this letter to the heads of executive departments and establishments for guidance toward greater uniformity in Government copyright matters.

In developing these views we have benefited from the extensive studies and hearings which have been conducted on the question of copyright in Government publications. They provide a valuable background source for understanding the problems which have developed over the years and of the views which are outlined in the following sections.

1. Definition of Government publication.

A major obstacle to uniformity has been the lack of clear definition of the term "publication of the United States Government", as used in the Copyright Law (17 USC 8) and the term "Government publication" as used in the Printing Law (44 USC 58). We believe the following provide an adequate explanation of the meaning which these terms should be given:

Works prepared for the Government by its officers or employees as part of their official duties are "Government publications" within the copyright prohibition, regardless of whether they are published by the Government or privately. Under this definition --

a. Works prepared by private persons do not become "Government publications" by reason of their being published by the Government.

b. Works prepared by officers or employees of the Government in their private capacity (i.e., not as a part of their official duties) are not "Government publications", even if they allow the Government to publish them.

c. Works prepared by private persons under contracts with or grants from the Government are not "Government publications", even though the Government is allowed to publish them. (The rights of the Government and of the contractor or grantee with respect to copyright are matters to be settled by the terms of the contract or grant.)

d. The Government may acquire copyright in privately produced works by assignment, gift, bequest or otherwise, and may take a license, either exclusive or nonexclusive, in any such work.

2. Copyright in works under Government control.

The problems which agencies face with respect to copyright in works produced in connection with Government activities fall into two categories; the works of Government employees and the works of contractors or grantees. These involve different considerations and merit separate discussion.

Works by Government employees. Works prepared for the Government by its employees as part of their official duties are not eligible for copyright protection, since these works are "Government publications". On the other hand, Government employees, like any other authors, are entitled to secure copyright in their personal writings. Whether any particular work produced by a Government employee is the Government's or his own (i.e., whether it was or was not produced as part of his official duties) is a question of fact, and there will no doubt be borderline cases in which the employing agency will need to exercise its judgment in determining this question.

Where the work is determined to be a product of an employee's official duties, it is a Government publication, and consequently, the employee has no proprietary right in such work. Accordingly, the following principles are followed with respect to such work whether the work is published by the Government or by a private publisher.

a. The employing agency exercises control over the release

for initial publication of works prepared by its employees as part of their official duties.

b. When such a work is published, no copyright claim by any one should be allowed.

c. When an agency makes such a work available to a private publisher for inclusion in a publication in which copyright is claimed by virtue of other material, the agency should ordinarily request the publisher to indicate in the work its governmental source.

Personal works of employees, though not prohibited from copyright, may be subject to agency clearance requirements. Agencies may encourage their employees to write as private individuals on their own time, and may require that such private writings, if the subject matter relates to the agency or a field within its functions, be cleared by the agency for security or policy reasons before publication. Such writings should be identified as a personal expression of the author's views disassociated from the agency's. Subject to these requirements, the employee ordinarily should be free to have his personal writings published privately and to secure copyright in them.

Agencies recognize that under 28 USC 1498(b), the Government is not liable for infringement with respect to a copyrighted work prepared by an employee who used Government time, material, or facilities. In this respect, any disciplinary action to be taken against an employee who uses Government time, materials or facilities for his personal works is a matter for agency regulation and determination in each case. It would not be reasonable to formulate Government-wide rules on this point.

Works by contractors or grantees. In some instances, the preparation of a specific work by a Government contractor or grantee may be the primary object of the contract or grant; in other instances a work may be prepared as an incident or by-product of a contract or grant, as, for example, a report prepared as an incident to a contract or grant for research and development. In any case, works prepared by contractors or grantees would not be considered "Government publications" within the copyright prohibition. Whether the contractor or grantee is permitted to secure copyright, and, if so, the Government's right to use the work or receive assignment of the copyright, are matters for specification in the contract or grant.

As to permitting contractors to secure copyright, we believe that no single set of rules will fit all cases. Allowance is therefore made for a considerable degree of administrative discretion within the broad principles considered generally applicable. Underlying these principles are criteria which recognize that contractors should be encouraged to produce written material of a kind and quality that will be in the public interest, and that the dissemination of information

developed under Government auspices should be fostered. It is also recognized that in some instances, the public interest may be served by allowing the contractor to exploit his work commercially where there is a commercial market through which the work can be disseminated more effectively. At all times, however, the contractor's interest in acquiring proprietary rights must be subordinate to the Government's interest in using the work and in making it available to the public.

In line with the above criteria, agencies are guided by the following principles with respect to works by contractors and grantees:

a. A Government contractor or grantee should ordinarily not be permitted to secure copyright in a work which is --

(1) produced for the Government as the primary object of the contract or grant;

(2) intended for use by the Government alone; or

(3) intended primarily for general use by the public.

b. A Government contractor or grantee may ordinarily be permitted to secure copyright in a work prepared as an incident or by-product of a contract or grant.

c. In the circumstances of any particular case, and in accordance with the above criteria the agency concerned may permit the contractor or grantee to secure copyright in a work of a kind referred to in (a), or may deny such permission in regard to a work of a kind referred to in (b).

d. In every case where a contractor or grantee is permitted to secure copyright, the Government should acquire at least an irrevocable, nonexclusive, royalty free, license to publish the work or have it published and to make any other use of it.

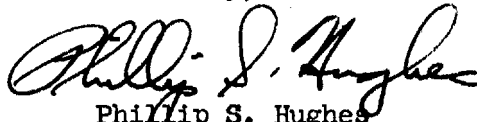
3. Exception to the general prohibition against copyright in Government publications.

Notwithstanding the policy guidelines listed in section 1, we believe there are some situations where the public interest would be served by permitting agencies to obtain copyright in Government publications. While the statutes prohibit such action at the present time we would favor legislative authority which would permit an exception to the general prohibition against copyright in Government publications. We have in mind authority which would permit the head of any Federal agency to secure copyright on behalf of the United States in a Government publication upon his statement to the

Register of Copyrights that (1) such action is justified in the public interest and (2) that the circumstances are not inconsistent with the following minimum restrictions:

- a. The publication is not an official edict of the agency.
- b. The publication is not an historical account of agency policy, organization, activity or achievement.
- c. The primary purpose of the publication is for public use rather than internal Government use.
- d. The intended consuming group does not look to the Government as the traditional source for such type of publication.
- e. No royalties for authorship are permitted to accrue to the benefit of an officer or employee of the Government or to any person or organization other than the Federal Government.
- f. The publishing by private publisher does not result in any greater cost to the Government than if published by Government facilities.

Sincerely,



Phillip S. Hughes
Assistant Director for
Legislative Reference